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MEMORANDUM

February 3, 2017

To: Housing Clients

From: HOBBS, STRAUS, DEAN & WALKER, LLP

Re: *NAIHC Legislative Committee Meeting*

This memo reports on the monthly NAIHC Legislative Committee meeting, held by teleconference on February 2, 2017.

1. NAHASDA Reauthorization

Paul Moorehead, NAIHC's lobbyist, gave an update on NAHASDA reauthorization. NAIHC's strategy, developed in the weeks since the legal symposium and on the call in early January, is two-pronged. The first is to seek a one-line provision in some must-pass, fast-tracked bill that would simply reauthorize the Indian Housing Block Grant for a period of years. That would allow tribes to continue operating under the existing NAHASDA statute, and head off the questions that certain House appropriators might ask about why an unauthorized program should be funded at all. The second prong would be to continue to push forward a more detailed NAHASDA reauthorization bill, using the "consensus bill" that had been negotiated between the House and Senate staffers late in the last session.

Mr. Moorehead responded to a number of questions, but mainly to point out that it is too early in the session to know much more. The NAIHC Chair, Sami Jo Difuntorum, sent a letter to the relevant committee chairs and other reauthorization advocates outlining this strategy. We have not heard any response yet. We do not know how viable this approach will be. While the "one-line" IHBG reauthorization approach has appeal, we still have not had substantive or strategic discussions with the key players, because Congress is busy with other priorities at the moment. No particular bill has been identified as a vehicle, and we do not know if there will be support for this approach. He also noted that the "consensus bill" that had previously been agreed upon contained language for the Native Hawaiian NAHASDA provisions, but since that time the Chair of the House Appropriations Committee, Jeb Hensarling, has signaled that he is now opposed to such a provision. Mr. Moorehead did meet with staff at the House Financial Services Committee, but mainly to lay out NAIHC's plan, but he has not yet received any feedback. Representative Sean Duffy (R-WI), the Chair of the Housing Subcommittee, will be taking the lead on the NAHASDA reauthorization bill at the committee level. Mr. Moorehead is planning to meet with him and his staff next week.

In response to a question about what steps can NAIHC members take, Mr. Moorehead suggested writing letters to your members of Congress, telling them that NAHASDA reauthorization is a priority (and explain why it is important in terms of housing and jobs), that it has already been vetted repeatedly and passed twice by the House, and that we need to get this done now so we can move on.

Mr. Moorehead also discussed questions regarding whether this Congress was potentially moving forward with some anti-Indian proposals from the Goldwater Institute, ideas that are presented as for the benefit of tribes (such as removal of federal oversight and jurisdiction) but that will actually undermine sovereignty. Mr. Moorehead said he was not aware of such efforts, but also pointed out that tribes themselves have moved for such efforts in the recent past (he pointed to the HEARTH Act as an example). One of the participants pointed to a bill, S. 103, that would undo many of the requirements of the Fair Housing Act (it would, for example, allow exclusionary zoning), but that also had a provision that would prohibit HUD and other federal agencies from using data to show the disparate impacts of housing policies. The concern is that such language might also prohibit analysis of impacts and needs specific to Indian Country.

2. Funding Task Force

Another initiative that the Legislative Committee discussed was whether there was a need and desire to establish a task force that would deal specifically with funding issues. Funding is an ongoing, critical issue for most tribal housing programs, and the amount of funds provided through the Indian Housing Block Grant appropriations is simply insufficient. For much of the past year, certain members of the Legislative Committee have been pushing for the establishment of a Funding Task Force that would specifically address these issues. Chairman Cooper asked the Committee members for input on (1) whether this was a good idea (the general response seemed to be yes it was); (2) who should be on the Task Force; (3) how should meetings be conducted; and (3) when and how often should it meet?

The discussion focused on whether the Task Force should be structured like the Legislative Committee, with anyone who wants to participate being allowed to participate, with a monthly phone call set up, or whether there should be a specific group of persons, say one representative from each region, that would be the Task Force, with anyone who wanted to listen in and have input be permitted to do so (like the negotiated rulemaking committee). No resolution was reached on the call. NAIHC will set up a separate call to address this issue specifically.

3. Section 184 Issues

Denise Zuni, an attorney from New Mexico, made a brief presentation on the issues she has raised previously about the Section 184 loan guaranty process – specifically, the recent position taken by HUD (as required by the Department of Justice) that the Tribal Ordinances for foreclosure on such loans must provide for jurisdiction in a

forum other than tribal court, because DOJ does not believe that the United States can be subject to the jurisdiction of a tribal court. Ms. Zuni has drafted a letter that will come from the NAIHC Board to HUD, asking that HUD create a Section 184 Guidance Committee to engage the tribes on these and other issues related to Section 184. The letter will also push back against the notion that tribal courts cannot hear cases involving the United States. The letter will be sent to both HUD and to the Department of Justice Office of Tribal Justice. The NAIHC is going to review and approve. The letter will also be available for all NAIHC members to send individually.

4. FEMA Flood Mapping Issues

Ms. Zuni also discussed an issue regarding FEMA flood mapping. The federal Flood Disaster Protection Act of 1973 prohibits the use of federal funds for construction and rehabilitation on floodplains unless a community participates in the National Flood Insurance Program (NFIP) and purchases flood insurance. This prohibition is imposed on Indian Housing Block Grant (IHBG) funds by 24 CFR 1000.38 (the NAHASDA regulations). The prohibition also applies to Indian Community Development Block Grant (ICDBG) funds.

A tribe whose lands have been flood mapped by FEMA and have been designated as being in flood plains cannot use IHBG or ICDBG funds, or for that matter, any federal funds for housing construction or rehabilitation, unless the tribe participates in the NFIP, mitigates the flood risks, and purchases flood insurance. The vast majority of tribes do not participate in the NFIP. According to a January 2013 GAO Report, only 37 tribes participate in the NFIP.

States, however, have apparently received exemptions that allow them to spend public housing and Community Development Block Grant funds in those areas. 24 CFR 58.6(a)(3) (the HUD environmental regulations), and 24 CFR Part 55(b)(1) (the HUD floodplain management regulations), appear to exempt states from the prohibition, specifically in their use of HOME funds and Community Development Block Grant (CDBG) funds. If this is accurate, a Public Housing Authority can use HOME and CDBG funds, and perhaps HUD public housing funds, on floodplains even if a community isn't a member of the NFIP. Ms. Zuni raised the following points regarding this issue:

1. FEMA shouldn't flood map tribal lands without written tribal authorization.
2. Flood mapping of tribal lands by FEMA without clear and express tribal authorization should be removed from FEMA's website.
3. It is a costly and administratively burdensome process to amend flood maps. In some instances, amendments aren't possible unless a tribe joins the NFIP.
4. The unauthorized flood mapping of tribal lands and requiring participation in the NFIP as a condition of federal housing funds interferes with tribal sovereignty and the right of tribes to self-governance. Many tribes have the capacity to assess and manage their flood risks without federal oversight. If a

tribe wants federal assistance in managing its flood risks, it can at that point join the NFIP as a condition of receiving federal assistance.

5. Why do states get an exemption, but not tribes?

Ms. Zuni proposed that this be a priority issue for NAIHC legislative advocacy. She suggested that NAIHC make an effort to obtain a similar exemption for use of IHBG and ICDBG funding as the states already have.

5. FY 18 Budget Recommendations from SD Native Homeownership Coalition

Joanna Donohoe from the South Dakota Native Homeownership made a presentation on FY Budget Recommendations they have developed, and suggested that NAIHC should support these recommendations. (A copy of the recommendations is attached to this memo.)

The main point discussed was the USDA Rural Development direct loan program. According to Ms. Donahue and the Coalition, USDA Rural Development has limited staff resources to provide Single Family Housing direct loans on tribal land. In FY 2016, of the 7,113 direct loans made nationally by Rural Development, only 12 of them were to American Indians or Alaska Natives on tribal land. Because Native community development financial institutions (CDFIs) have experience operating on tribal land, and because they provide extensive financial and homebuyer education, the Coalition is proposing a demonstration project relending program would increase the flow of mortgage capital to Indian Country. It would allow Native CDFIs to be eligible borrowers under the 502 Direct Loan Program and enable them to relend to eligible families for the construction, acquisition, and rehabilitation of affordable housing. There was general support for this idea, and it will be discussed further at the next Legislative Committee meeting.

6. NAIHC Legislative Priorities

Chairman Cooper noted that NAIHC is still trying to develop its list of legislative priorities for the upcoming session. While the two top issues – NAHASDA reauthorization and increased funding – appear to have a general consensus, there is no agreement yet on the next few priorities that NAIHC should be pursuing. NAIHC has received feedback from some, but not all of the regions. He asked that Legislative Committee members be prepared to discuss and to set priorities at the next meeting.

7. Announcements

NCAI is holding its annual 2017 Executive Council Winter Session in Washington, D.C., on February 13 – 16, at the Capitol Hilton.

The next NAIHC event is the Legislative Conference, to be held at the Washington Court Hotel in Washington, D.C., March 6 – 8, 2017. The Legislative

Committee will meet in person on March 6 at 1:30 PM at the hotel. NAIHC will also be hosting a reception at its offices that same day, starting at 4:30 PM.

If you have any questions about the items in this memorandum, please do not hesitate to contact Edmund Clay Goodman at EGoodman@hobbsstrauss.com or by phone at (503) 242-1745.